App. 1

[Filed July 28, 1993]

State of Illinois
County of Lake—ss

IN THE CIRCUIT COURT FOR THE 19TH JUDICIAL CIRCUIT LAKE COUNTY, ILLINOIS

No. 93 MR 11

VILLAGE OF LAKE BARRINGTON, an Illinois Municipal Corporation and VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE,

Plaintiffs,

v.

MARY E. HOGAN, COLE TAYLOR BANK, as Trustee Under Trust No. 77-432 dated December 19, 1977, SAM LOIACONO and RUTH LOIACONO, and UNKNOWN OWNERS,

Defendants,

MARY E. HOGAN, SAM LOIACONO and RUTH LOIACONO,

Counter-Plaintiffs and Third-Party Plaintiffs,

v.

VILLAGE OF LAKE BARRINGTON, VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE,

Counter-Defendants,

and

NANCY SMITH and JAMES P. BATEMAN,

Third-Party Defendants.

FIRST AMENDED COUNTER-COMPLAINT AND THIRD-PARTY COMPLAINT

MARY E. HOGAN, SAM LOIACONO and RUTH LOIACONO, Counter-Plaintiffs and Third-Party Plaintiffs by their attorneys, PAUL H. STACEY and DANIEL P. FIELD, for their Counter-Complaint against VILLAGE OF LAKE BARRINGTON, a Municipal Corporation, and VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE and for their Third-Party Complaint against NANCY SMITH and JAMES P. BATEMAN, allege and state as follows:

COUNT I

1. Counter-Plaintiff and Third-Party Plaintiff, MARY E. HOGAN (HOGAN) also known as MARY HANRAHAN, is the owner of the beneficial interest in a land trust which consists of property located within the VILLAGE OF LAKE BARRINGTON and in particular within an area of the VILLAGE known as the LAKE BARRINGTON BUSINESS AND INDUSTRIAL PARK and VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE.

2. SAM LOIACONO and RUTH LOIACONO (LOIACONOS) are the owners of property located within the VILLAGE OF LAKE BARRINGTON and in particular within an area of the VILLAGE known as the LAKE BARRINGTON BUSINESS AND INDUSTRIAL PARK and VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE.

3. The VILLAGE OF LAKE BARRINGTON (VILLAGE) is a municipal corporation located within the

County of Lake, State of Illinois which is organized and exists pursuant to the laws of the State of Illinois.

4. The VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE SPECIAL SERVICE AREA purports to be a specific service area created by the Counter-Defendant, VILLAGE OF LAKE BARRINGTON, in accordance with the laws of the State of Illinois.

5. Third-Party Defendant, NANCY SMITH (SMITH), was, at all relevant times, the president of the VILLAGE OF LAKE BARRINGTON and is being sued in this action solely in her individual capacity for her conduct which was performed under color of state law in the scope of her position as an officer of the Village.

6. Third-Party Defendant, JAMES P. BATEMAN (BATEMAN), was, at all relevant times, the duly appointed corporation counsel for the VILLAGE OF LAKE BARRINGTON and is being sued in this action solely in his individual capacity for his conduct which was performed under color of state law in the scope of her position as an officer of the Village.

7. On July 7, 1992 and October 20, 1992, Counter-Defendant, VILLAGE, enacted Ordinances which purport to establish Counter-Defendant, SPECIAL SERVICE AREA NUMBER THREE.

8. Thereafter, on November 17, 1992, Counter-Defendant, VILLAGE, enacted an Ordinance which provides that SIX MILLION DOLLARS ($6,000,000.00) be spent to improve the area known as the SPECIAL SERVICE AREA NUMBER THREE by installing sewer and water lines and requiring that the property owners, including Counter-Plaintiffs and Third-Party Plaintiffs, be taxed to retire the indebtedness of said improvements.

9. Certain owners of property within the purported SPECIAL SERVICE AREA, including HOGAN and LOIACONO, voiced objections to the need for the services to be provided and the procedure employed by Counter-Defendant, VILLAGE, to create the SPECIAL SERVICE AREA and suggested that a suit might be filed in the Circuit Court of Lake County to contest the validity of the Ordinances which purported to create the SPECIAL SERVICE AREA.

10. HOGAN, LOIACONOS and other property owners within the purported SPECIAL SERVICE AREA retained an attorney, JAMES P. HECHT (HECHT) to counsel them and directed HECHT to institute proceedings in the Circuit Court of Lake County to peaceably determine the validity of the questioned ordinances.

11. HECHT, after evaluating the factual circumstances of the case, prepared a Complaint to be filed on behalf of HOGAN, LOIACONOS and others seeking an injunction against the VILLAGE and SPECIAL SERVICE AREA and a declaration that the ordinances in question were invalid, a copy of which is attached hereto as Exhibit 1.

12. HECHT also, pursuant to 735 ILCS 5/18-102 wrote to the State's Attorney of Lake County and the Attorney General of the State of Illinois requesting that each bring a quo warranto proceeding against the VILLAGE and SPECIAL SERVICE AREA or alternatively to expressly refuse to bring said action thus enabling HECHT to file such an action in the name of his clients, copies of which are attached hereto as Exhibits 2 and 3.

13. Sometime prior to December 9, 1992, HECHT advised BATEMAN that a suit would be filed to contest the validity of the ordinances.

14. Thereafter, BATEMAN and SMITH met in their respective roles as officers of the VILLAGE and agreed that HOGAN and LOIACONOS and the other property owners represented by HECHT should be dissuaded by any means available from filing said lawsuit.

15. At the time said agreement was reached between BATEMAN and SMITH, it was clearly established that HOGAN and LOIACONOS had rights vested in them by the First Amendment to the United States Constitution enforceable against BATEMAN and SMITH through the Fourteenth Amendment of said Constitution of access to the Courts, to petition for redress of grievances, to speak out on matters of public concern and to criticize governmental actions and officials.

16. Notwithstanding the aforesaid rights secured to HOGAN and LOIACONOS by the United States Constitution, BATEMAN and SMITH agreed and in doing so conspired together to threaten HOGAN, LOIACONOS and the other property owners with a suit praying for SIX MILLION DOLLARS ($6,000,000.00) in damages against them if they sought a judicial determination of the validity of the questioned ordinances.

17. BATEMAN and SMITH further conspired against HOGAN and LOIACONOS by agreeing that even if no suit testing the validity of the ordinances was filed, a damages action would still be filed by them on behalf of the VILLAGE and SPECIAL SERVICE AREA against HOGAN and LOIACONOS unless, HOGAN, LOIACONOS and HECHT's other clients, whose identity was at that time unknown to BATEMAN and SMITH, expressly agreed to forebear the exercise and thereby waive their aforesaid constitutional rights.

18. Sometime prior to December 9, 1992, BATEMAN advised HECHT that if HOGAN and LOIACONOS and HECHT's other clients sought a judicial determination of the validity of the aforesaid ordinances that BATEMAN was authorized by SMITH, the VILLAGE and the SPECIAL SERVICE AREA to file an action for damages against HOGAN and LOIACONOS.

19. Thereafter, on December 9, 1992, HECHT met with HOGAN and LOIACONOS and provided them with a copy of a Complaint (Exhibit 1) which HECHT had prepared for filing to test the validity of said ordinances, explained the legal basis for the Complaint and advised HOGAN and LOIACONOS of the threat of damages litigation to be brought against them by BATEMAN and SMITH on behalf of the VILLAGE and SPECIAL SERVICE AREA should they proceed with their suit testing the validity of the questioned ordinances.

20. The next day, HOGAN advised HECHT that she would not lend her name to the suit HECHT was about to file on her behalf in light of her belief, as a result of the threat made by BATEMAN, that she could be exposed to a judgment of as much as SIX MILLION DOLLARS ($6,000,000.00) in damages to the VILLAGE and the SPECIAL SERVICE AREA should she proceed with her lawsuit.

21. LOIACONOS also advised HECHT not to file the Complaint at that time for fear of a judgment for damages being imposed against them which fear was the direct and proximate result of the threat made to HECHT by BATEMAN to file such an action.

22. Thereafter, HECHT received the requested denials from the State's Attorney of Lake County and

Attorney General of the State of Illinois of his request that they bring an action in quo warranto against the VILLAGE, thus, affording HOGAN and LOIACONOS standing to bring such an action in their own name.

23. Notwithstanding this development, HOGAN and LOIACONOS, due solely to the threat made against them by BATEMAN of a damages action should they contest the validity of said ordinances, directed HECHT not to file an action in quo warranto at that time.

24. On December 17, 1992, BATEMAN, in furtherance of his agreement with SMITH to prevent HOGAN and LOIACONOS from filing suit, called HECHT and demanded that HECHT reveal the names of all of his clients who sought to challenge the validity of the ordinances, stating that he already knew that HOGAN was a HECHT client and that if HECHT did not reveal the names of the others that BATEMAN would "use his own ways" to discover their identities and would sue them all for damages on behalf of the VILLAGE unless each of them assured that they would undertake no efforts to challenge the ordinances.

25. Later that date, BATEMAN once again called HECHT and advised him that he had talked to SMITH and that SMITH had told BATEMAN that she was willing to meet with HECHT to discuss compromising the competing interests.

26. HECHT advised HOGAN and LOIACONOS that they should consider meeting with SMITH as the alternative was to defend the threatened claim of the VILLAGE for damages.

27. Thereafter, HECHT arranged to meet with BATEMAN and SMITH on Monday, December 21, 1992 at 5:00 p.m. at BATEMAN's office to discuss this matter.

28. Late on December 17, 1992, BATEMAN called HECHT and advised him that SMITH would only attend such a meeting if all of HECHT's clients were personally present.

29. The demand that all of HECHT's clients attend said meeting was an attempt by SMITH and BATEMAN to ascertain the identity of HECHT's clients so that they could be named in the damages action they intended to file.

30. On December 18, 1992, BATEMAN once again called HECHT demanding to be told what HOGAN, LOIACONOS and the others were going to do.

31. HECHT responded by telling BATEMAN that the threatened damages action had caused HOGAN and LOIACONOS to rethink whether or not they were willing to challenge the ordinances.

32. On December 21, 1992, BATEMAN faxed a letter to HECHT demanding to be told within twenty-four hours if HOGAN and the other clients of HECHT's intended to sue, a copy of which is attached hereto as Exhibit 6.

33. On December 22, 1992 at approximately 11:50 a.m., BATEMAN telephoned HECHT and advised him that CHARLES HUG, the bond counsel for the VILLAGE was on the line and demanded to know HECHT's clients' response to the letter of December 21, 1992.

34. HECHT advised BATEMAN that he would respond to him in writing that day.

35. HOGAN and LOIACONOS, as a result of the threats of BATEMAN and SMITH, advised HECHT that in light of the threatened damage claim, they were still uncertain whether or not they were willing to proceed with an action to determine the validity of said ordinances.

36. On December 22, 1992, HECHT responded to BATEMAN by advising him that he had prepared a suit and engaged in preliminary quo warranto matters, but as a result of his threats to sue HOGAN, LOIACONOS and the others for damages his clients had been "given cause to reconsider" pursuing their action and that BATEMAN's threats presented a dilemma to HOGAN and LOIACONOS, a copy of said letter is attached hereto as Exhibit 7.

37. On December 24, 1992 December 30, 1992, HOGAN and LOIACONOS were again advised by HECHT of BATEMAN's threats to sue them and that said threats to sue HECHT as well presented a conflict of interest which would preclude HECHT from defending HOGAN and LOIACONOS in the event such a suit was filed.

38. Once again, in reaction to the threats of BATEMAN and SMITH, HOGAN and LOIACONOS directed HECHT to undertake no action to ascertain the validity of the ordinances in question.

39. Thereafter, on January 5, 1993, Counter-Defendants, VILLAGE and the SPECIAL SERVICE AREA and Third-Party Defendants, SMITH and BATEMAN, carried out their threats by filing in the Circuit Court of Lake County an action for damages against HOGAN and LOIACONOS which action in essence alleged that

HOGAN and LOIACONOS were liable in tort to the VILLAGE and the SPECIAL SERVICE AREA for threatening to seek a judicial determination of the validity of the Ordinances aforesaid.

40. This lawsuit was filed at the express direction of and with the approval of Third-Party Defendants, SMITH and BATEMAN.

41. The filing of said lawsuit has been ratified by the Defendants, VILLAGE and SPECIAL SERVICE AREA, which continued to maintain said lawsuit and filed an Amended Complaint in Response to the Dismissal by this Court of the original Complaint.

42. The threats made against HOGAN and LOIACONOS should they seek a judicial determination of the validity of the ordinances which purport to create the SPECIAL SERVICE AREA and the filing of this lawsuit are all actions which are done under color of law of the State of Illinois.

43. The acts of the VILLAGE, SPECIAL SERVICE AREA, SMITH and BATEMAN, in threatening HOGAN and LOIACONO with litigation should they question the validity of said Ordinances or seek to petition this Court for redress of grievances had an actual chilling effect on the right secured to HOGAN and LOIACONOS of access to the Courts for and to petition redress of wrongs secured to HOGAN and LOIACONOS by the First Amendment to the United States Constitution made applicable to the VILLAGE, its SPECIAL SERVICE AREA and its President and Attorney by the Fourteenth Amendment to the United States Constitution.

44. The filing of the instant lawsuit is in retaliation against HOGAN and LOIACONOS for professing a

desire to exercise their rights aforesaid secured to them by the First and Fourteenth Amendments to the United States Constitution.

45. This action is brought pursuant to 42 U.S.C., Sec. 1983 which confers jurisdiction on this Court concurrently with the Courts of the United States.

46. HOGAN and LOIACONOS have sustained damages as a result of the attempts by Counter-Defendants and Third-Party Defendants to deprive them of their First Amendment rights.

47. Counter and Third-Party Plaintiffs, HOGAN and LOIACONOS, seek a declaration from this Court that the threats of litigation made in December of 1992 and the filing of this lawsuit in January of 1993 served to deprive them of their First Amendment rights to petition the Court for redress of wrongs and of access to the Courts and that such threats and action in filing this suit are illegal.

48. That the acts of Counter-Defendants and Third-Party Defendants of threatening Plaintiffs with litigation and, in fact, filing suit against them are done intentionally and with the express purpose of deterring Plaintiffs from seeking a judicial determination of the validity of the acts of the VILLAGE which purport to create said SPECIAL SERVICE AREA and are, therefore, actionable under Sec. 1983.

WHEREFORE, Counter-Plaintiffs and Third-Party Plaintiffs pray that this Court enter its Order granting them the following relief:

A. Compensatory damages against the Counter-Defendants and Third-Party Defendants in an amount in ex-

cess of the jurisdictional limit of the Law Division of the Circuit Court of Lake County.

B. Punitive damages against Third-Party Defendants, NANCY SMITH and JAMES P. BATEMAN, in their individual capacities, in the amount of ONE MILLION DOLLARS ($1,000,000.00).

C. A declaration that the acts of Counter-Defendants and Third-Party Defendants in threatening a suit for damages against Counter and Third-Party Plaintiff and, in fact, instituting such suit contravenes the rights secured to Counter and Third-Party Plaintiffs under the First and Fourteenth Amendments to the United States Constitution to petition the Court for redress of wrongs.

D. Attorney's fees pursuant to 42 U.S.C. Sec. 1988 as well as other costs of suit.

E. Such other relief as this Court deems just and fit.

COUNT II

1-8. These Counter and Third-Party Plaintiffs reallege as Paragraphs One through Eight of this Count II those allegations previously set forth as Paragraphs One through Eight of Count I as though fully set forth herein.

9. That the acts of Counter-Defendants in creating said SPECIAL SERVICE AREA in such a fashion as it includes only the property contained in LAKE BARRINGTON BUSINESS AND INDUSTRIAL PARK and excluding all residential and other areas within the VILLAGE OF LAKE BARRINGTON is arbitrary and without rational basis in fact.

10. That the action of said Counter-Defendants discriminates against the owners of business property in

that they have been selected for disparate treatment from the owners of other property within the VILLAGE.

11. The treatment of said property owners affected by the creation of the SPECIAL SERVICE AREA is unreasonable and without a rational basis in fact as residential properties are far greater users of water and sewage than are the commercial users affected by the Ordinance yet those properties will not be taxed nor required to tie into new water and sewer systems.

12. That the acts of Counter-Defendants purposefully and intentionally discriminates against the class of property owners including Counter-Plaintiffs which own commercial property by unlawfully placing an increased financial burden upon them and not on other classes of property for the creation of improvements which are unnecessary.

13. That by enacting said Ordinances, Counter-Defendants have denied Counter-Plaintiffs equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution.

14. In particular, the territory of the SPECIAL SERVICE AREA excludes therefrom parcels of land that otherwise have a rational relationship to the purpose for which the SPECIAL SERVICE AREA is purportedly created, are contiguous to parcels of land within the territory and some of said excluded parcels are improved and occupied and have septic systems that could be replaced by sanitary sewer services and water presently planned for this SPECIAL SERVICE AREA and that otherwise could be served by the services presently planned to be provided by the SPECIAL SERVICE AREA but are improved by residential structures rather than commercial or retail structures.

15. At least two of these excluded parcels are completely surrounded on all sides by parcels of land which are included within the SPECIAL SERVICE AREA but do not include residences.

16. The purpose of Counter-Defendants in excluding these parcels of land is that they contain sufficient electors who have voiced opposition to the plan as to enable them to join with Counter-Plaintiffs to employ statutory devices to defeat the creation of the SPECIAL SERVICE AREA.

17. There is also excluded from said SPECIAL SERVICE AREA certain parcels of land which are adjacent to the SPECIAL SERVICE AREA and are to be developed with residential structures which could benefit from the services which the SPECIAL SERVICE AREA was purportedly created to provide.

18. There is no rational basis for excluding these parcels of land which has the effect also of excluding the aggregate sum of at least $234,070.00 from the total assessed valuation of the SPECIAL SERVICE AREA as determined for the year 1992 other than to assure that any efforts undertaken by Counter-Defendants to employ the statutory mechanism to defeat the SPECIAL SERVICE AREA will be unsuccessful.

19. The SPECIAL SERVICE AREA was purportedly created to provide greater safety to the structures within its boundaries by providing a water supply to be employed in the event of fire yet those structures within the outer boundaries of the SPECIAL SERVICE AREA where individuals will be found both day and night are excluded from the SPECIAL SERVICE AREA and, thus, will be deprived of the benefits provided by the improvements planned therein.

WHEREFORE, Counter-Plaintiffs pray that this Court enter its Order granting relief as follows:

A. Declaring said Ordinances which purport to create VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE and to levy any taxes in support thereof to be void and unconstitutional.

B. Award Counter-Plaintiffs damages sustained as a result of the enactment of said Ordinances.

C. Award Attorney's fees pursuant to 42 U.S.C., Sec. 1988 as well as other costs of suit.

D. Such other relief as may be just and proper.

Respectfully Submitted,

MARY HOGAN, SAM LOIACONO and RUTH LOIACONO, Counter-Plaintiffs and Third-Party Plaintiffs

By: _____
DANIEL P. FIELD,
one of their attorneys

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[EXHIBITS OMITTED DURING PRINTING]

[Filed Sept. 10, 1993]

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County of Lake—ss

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Counter-Defendants,

and

NANCY SMITH and JAMES P. BATEMAN,

Third-Party Defendants.

MOTION TO DISMISS FIRST AMENDED COUNTER-COMPLAINT AND THIRD-PARTY COMPLAINT

NOW COMES the Third-Party Defendant, JAMES P. BATEMAN, by and through his attorneys, O'REILLY, CUNNINGHAM, NORTON & MANCINI, and moves this Honorable Court pursuant to Sections 5/2-615, 5/2-619(9) and 5/2-1115 of the *Code of Civil Procedure of the State of Illinois*, to dismiss the Third-Party Complaint filed by MARY E. HOGAN, SAM LOIACONO and RUTH LOIACONO, against him, and in support thereof, states as follows:

INTRODUCTION

1. That Count I of the First Amended Counter-Complaint and Third-Party Complaint filed by MARY E. HOGAN, SAM LOIACONO and RUTH LOIACONO (hereinafter referred to as "Third-Party Plaintiffs"), contravenes Section 5/2-615 of the *Code of Civil Procedure of the State of Illinois* in that it is substantially insufficient in law and is barred by other affirmative matter pursuant to Section 5/2-619 of the *Code of Civil Procedure of the State of Illinois* in the following respects:

A. That Count I of the First Amended Counter-Complaint and Third-Party Complaint sets forth no actionable First Amendment claim against the Third-Party Defendant, JAMES P. BATEMAN, since JAMES P. BATEMAN was acting as the Village Attorney of the Village of Lake Barrington and, as a Village official, clearly possessed the right, under the First Amendment, to petition the Court for redress of this grievance. As such, the act of petitioning the Court, or any statements that the Third-Party Defendant, as Village Attorney of the Village

of Lake Barrington, intended to take such action on behalf of the Village and the Special Service Area were privileged and not actionable as a matter of law.

B. Importantly, JAMES P. BATEMAN, as a public official, acting under color of law was clothed with a qualified immunity from actions such as this. The Third-Party Plaintiffs have failed to allege any facts sufficient to overcome the qualified immunity extended to JAMES P. BATEMAN, as Village Attorney for the Village of Lake Barrington, under well-settled case law of the United States Supreme Court and, therefore, the First Amended Counter-Complaint and Third-Party Complaint is substantially insufficient as a matter of law and should be dismissed.

C. Further, Count I of the First Amended Counter-Complaint and Third-Party Complaint fails to set forth any facts establishing, objectively, that the Third-Party Plaintiffs have been deprived of any substantial liberty under the First Amendment, as is required to sustain an action brought pursuant to 42 U.S.C., Section 1983.

2. That Count I of the First Amended Counter-Complaint and Third-Party Complaint, in its prayer for relief, at Paragraph B, seeks punitive damages against JAMES P. BATEMAN, which prayer for relief contravenes Section 5/2-115 of the *Code of Civil Procedure of the State of Illinois*, since Section 5/2-115, on its face, mandates that punitive damages are not recoverable in cases such as this brought against attorneys.

ARGUMENT

As has been set forth at length in the brief and argument filed by the VILLAGE OF LAKE BARRINGTON,

the Village and its officials, of whom JAMES P. BATEMAN is one, having admittedly been joined by the Third-Party Plaintiffs in this matter for his acts as a Village official, have an absolute First Amendment right to petition this Court for redress of grievances.

The Third-Party Defendant will not burden this Court by restating the cases and arguments set forth by the VILLAGE OF LAKE BARRINGTON, but adopts these arguments and reiterates the Village's referral of the Court to the case of *Stearn v. United States Gypsum, Inc.*, 547 F.2d 1329, as well as the cases supportive of the *Noerr-Pennington Doctrine*, i.e., *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585 (1965). Nowhere in the *Village of Lake Barrington, et al. v. Mary E. Hogan, et al.* have any facts been set forth and, nowhere in the operative facts of the incident which is the subject of this lawsuit could there be any facts found which would support any claim that the instant lawsuit falls within the "sham" exception to the *Noerr-Pennington Doctrine*.

The simple facts of this case are that JAMES P. BATEMAN, as Village Attorney at the direction of the Village of Lake Barrington, has filed this action seeking a determination of the rights of the VILLAGE OF LAKE BARRINGTON and VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE as to their ability to create and implement the Special Service Area in question, and to seek redress from the Court with regard to the conduct of the Third-Party Plaintiffs as to their continued efforts to impede the Village in the reasonable exercise of this governmental function.

Acting as the Village Attorney in the foregoing manner, JAMES P. BATEMAN, in addition to functioning in a reasonable manner to exercise the constitutional rights afforded to the VILLAGE OF LAKE BARRINGTON and VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE, possesses a qualified immunity from suits such as the First Amended Counter-Complaint and Third-Party Complaint for civil damages. This immunity was formulated by the Supreme Court *specifically* with regard to 42 U.S.C. Sec. 1983 claims against governmental officials in the case of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The *Harlow* case applies a standard of objective legal reasonableness to a public official's acts and holds that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

In the instant case, JAMES P. BATEMAN comported himself in an objectively legally reasonable fashion, as is born out by the allegations of the First Amended Counter-Complaint and Third-Party Complaint at Paragraphs 26, 27, 31, 35, 36, 37 and 38, the Third-Party Plaintiffs had legal counsel throughout their dealings with JAMES P. BATEMAN. Based upon advice given to them by their legal counsel, Mr. Hecht, which advice apparently reflected the reasonableness and legal efficacy of the actions contemplated by the Counter- and Third-Party Defendants, as communicated by BATEMAN to Hecht, the Third-Party Plaintiffs allegedly considered forbearing from the filing of a lawsuit. Clearly, these admissions in their pleadings by the Third-Party Plaintiffs of the objec-

tive reasonableness of JAMES P. BATEMAN's conduct demonstrate that the Third-Party Defendant is entitled to the qualified immunity extended to him under the *Harlow* case.

Further evidence of the objective legal reasonableness of JAMES P. BATEMAN's conduct is the fact that, while Counts II and III of the Complaint were dismissed by this Court, there was no allegation made or judicial finding that Counts II and III were not brought in good faith or without legal basis. The mere fact that certain counts of the counterclaim have been dismissed by the Court does not evidence that the attorney who brought the case on behalf of the municipality and service area involved was acting outside the standard of objective legal reasonableness.

It is, therefore, entirely appropriate for this Court to dismiss the First Amended Counter-Complaint and Third-Party Complaint as they pertain to JAMES P. BATEMAN at this juncture. As the *Harlow* Court stated:

> "Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly establish law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently-applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. . . .

> "Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences'." *Harlow v. Fitzgerald*, 457 U.S. at 818-819.

The actions taken by JAMES P. BATEMAN here were legitimate and did not implicate any clearly-established rights of the Third-Party Plaintiffs. The Third-Party Defendant was acting in an objectively reasonable fashion under the law to protect the legitimate interests of the VILLAGE OF LAKE BARRINGTON and VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE in his discussions with the Third-Party Plaintiffs' attorney and in the filing of the instant lawsuit. No set of facts has been set forth in the First Amended Counter-Complaint and Third-Party Complaint which overcome this immunity and, in fact, the admissions contained in the First Amended Counter-Complaint and Third-Party Complaint actively substantiate the fact that MR. BATEMAN's actions were legitimate and reasonable.

The allegations of the First Amended Counter-Complaint and Third-Party Complaint fail to set forth any factual allegation that any right or liberty has been lost by the alleged forbearance of the Third-Party Plaintiffs from filing their action against the VILLAGE OF LAKE BARRINGTON and VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE.

As the record in this case reflects, the Complaint in this cause was filed by the VILLAGE OF LAKE BARRINGTON and the Third-Party Defendant on January 5, 1993. An Amended Complaint for Declaratory Judgment and other relief was filed on March 22, 1993, and the Counter-Complaint and Third-Party Complaint was filed on April 15, 1993.

As can be seen from the Court record, the Third-Party Plaintiffs, in Count II of their Amended Counterclaim and Third-Party Complaint have set forth their objections to the creation and implementation of SPECIAL SERVICE AREA NUMBER THREE.

The United States Supreme Court recognized in the case of *Laird v. Tatum*, 408 U.S. 1, 92 S.Ct. 2318 (1972) that constitutional claims such as those put forth by the Third-Party Plaintiffs in this case are often inconsequential and subjective. As a consequence, *Laird* requires the showing of *objective* harm or a specific threatened future harm to make a claim such as that put forth by the Third-Party Plaintiffs justiciable.

As can be seen from the allegations of the Complaint, there is no objective harm set forth in the claimed "chill" of the Third-Party Plaintiffs' rights. They now stand before the Court, pleading in Count II of their First Amended Counter-Complaint and Third-Party Complaint the very same allegations they alleged that they would have filed, *ab initio*, in 1992. There has been no loss or deprivation suffered by the Third-Party Plaintiffs in any objective sense caused by the tolling of any Statute of Limitations or the loss of any evidence. Further, there has been no allegation of any *objective* impediment or barring access to the Courts undertaken by JAMES P. BATEMAN. MR. BATEMAN simply advised the Plain-

tiffs' legal counsel of the VILLAGE's and SPECIAL SERVICE AREA's intent to seek redress of its grievances and then proceeded to act upon this intent.

As the Third-Party Plaintiffs have admitted in their pleadings, any forbearance from acting which they exercised was at the advice of their own counsel, Mr. Hecht, apparently in response to the assessment by Mr. Hecht that the intended action on the part of the Village was well-founded, and would result in litigation adverse to the Third-Party Plaintiffs.

The action brought against JAMES P. BATEMAN, albeit defectively brought pursuant to 42 U.S.C. Sec. 1983 for the claimed "chilling effect" on the Third-Party Plaintiffs' First Amendment rights based upon his actions undertaken as Village Attorney for the VILLAGE OF LAKE BARRINGTON and VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE is, essentially, violative of Section 5/2-1115 of the *Code of Civil Procedure of the State of Illinois* which states:

> "Punitive damages are not recoverable in healing art and legal malpractice cases. In all cases, whether in tort, contract or otherwise, in which the plaintiff seeks damages by reason of legal, medical, hospital or other healing art malpractice, no punitive, exemplary, vindictive or aggravated damages shall be allowed."

The language of Section 5/2-1115 of the *Code of Civil Procedure* is all inclusive. Whether this Court considers this matter a tort or an otherwise-brought case, it is clear that the *Code of Civil Procedure of the State of Illinois* forbids the seeking of punitive damages against an attorney for actions arising out of the practice of law.

As the First Amended Counter-Complaint and Third-Party Complaint in this matter states, JAMES P. BATEMAN is being sued in his capacity as the Village Attorney, acting under color of law, for actions he took with regard to contemplated and filed litigation involving the Third-Party Plaintiffs. As such, this case falls within the ambit of Section 5/2-1115 of the *Code of Civil Procedure of the State of Illinois* and Paragraph B of Count I of the First Amended Counter-Complaint and Third-Party Complaint should be dismissed with prejudice.

CONCLUSION

As can be seen from the foregoing, the First Amended Counter-Complaint and Third-Party Complaint as it applies to JAMES P. BATEMAN and its claimed "chilling" of the Third-Party Plaintiffs' constitutional rights is one of those subjective, inconsequential claims addressed by the United States Supreme Court in its analyses in the *Harlow* and *Laird* cases.

Clearly, this situation, in which individuals who were represented by an attorney, forbore from the filing of litigation based upon statements of intent made by a Village Attorney to file counter-litigation, does not meet the standard required by the Supreme Court, both with regard to a lack of objective legal reasonableness in MR. BATEMAN's actions, or as to an objective harm caused by any delay in presenting the Third-Party Plaintiffs' claims to the Court, these claims are now fully and adequately before the Court in Count II of the First Amended Counter-Complaint and Third-Party Complaint.

These factors, as well as the fact that the Third-Party Plaintiffs seek punitive damages which are clearly not

cognizable against MR. BATEMAN under Illinois law, should fairly demonstrate to this Honorable Court that Count I of the First Amended Counter-Complaint and Third-Party Complaint as to MR. BATEMAN should be dismissed, in its entirety, with prejudice.

Respectfully submitted

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[Filed Nov. 24, 1993]

State of Illinois
County of Lake—ss

IN THE CIRCUIT COURT FOR THE 19TH JUDICIAL CIRCUIT LAKE COUNTY, ILLINOIS

No. 93 MR 11

VILLAGE OF LAKE BARRINGTON, an Illinois Municipal Corporation and VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE,

Plaintiffs,

v.

MARY E. HOGAN, COLE TAYLOR BANK, as Trustee Under Trust No. 77-432 dated December 19, 1977, SAM LOIACONO and RUTH LOIACONO, and UNKNOWN OWNERS,

Defendants,

MARY E. HOGAN, SAM LOIACONO and RUTH LOIACONO,

Counter-Plaintiffs and Third-Party Plaintiffs,

v.

VILLAGE OF LAKE BARRINGTON, VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE,

Counter-Defendants,

and

NANCY SMITH and JAMES P. BATEMAN,

Third-Party Defendants.

ORDER

This cause coming to be heard on the Motion of Village of Lake Barring, Village of Lake Barring Special Service Area Number Three and Nancy Smith to Dismiss Counts I and II of the First Amended Counter-Complaint and Third-Party Complaint, the Court having heard arguments of counsel and examined the pleadings, and memorandum and being fully advised finds as follows:

1. This action is one not involving a municipal government versus the State of Illinois.

2. Lake Barrington is a "person" within the meaning of the Fourteenth Amendment.

3. The *Noerr-Pennington* doctrine is applicable to this case.

4. The First Amended Counter-Complaint and Third-Party Complaint does not clearly state a "sham" exception to the *Noerr-Pennington* doctrine.

WHEREFORE Count I of the First Amended Counter-Complaint and Third-Party Complaint is dismissed with prejudice. The Motion to Dismiss Count II of said Complaint is denied.

ENTER: WILLIAM D. BLOCK
WILLIAM D. BLOCK,
Circuit Judge

Dated in Waukegan, Illinois
this 24th day of November, 1993.